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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO JAVIER MARMOLEJO,

Defendant and Appellant.

H033206

(Monterey County  
Super. Ct. Nos. SS042464A &  
SS060035A)

The trial court found that defendant Francisco Javier Marmolejo had violated his probation in case Nos. SS042464A and SS060035A, and sentenced him to four years in state prison. On appeal, defendant contends that the court lacked jurisdiction to impose sentence in case No. SS042464A because the term of probation expired before the court ordered revocation of his probation. We find that the record supports the finding that the trial court had jurisdiction when it revoked defendant's probation in case No. SS042464A, and therefore we will affirm the judgment.

**BACKGROUND**

The Monterey County District Attorney filed an information in case No. SS042464A on October 21, 2004, charging defendant with corporal injury to a

spouse (Pen. Code, § 273.5, subd. (a); count 1),<sup>1</sup> child endangerment (§ 273a, subd. (a); count 2), assault with a firearm (§ 245, subd. (a)(2); count 3), and making threats of violence (§ 422; count 4). On December 9, 2004, defendant pleaded no contest to count 1.<sup>2</sup> On January 13, 2005, the court granted the prosecution's motion to dismiss the remaining counts, suspended imposition of sentence, and placed defendant on *five years* formal probation.

On February 6, 2006, the probation officer filed a petition pursuant to section 1203.2 to revoke defendant's probation, alleging that defendant had been arrested for violating section 245, subdivision (a)(1). On February 7, 2006, the district attorney filed a complaint charging defendant with assault by means of force likely to produce great bodily injury or with a deadly weapon in case No. SS060035A. On February 15, 2006, the court found defendant in violation of probation in case No. SS042464A.

On March 2, 2006, the district attorney filed an information, in case No. SS060035A. Defendant pleaded guilty to the section 245, subdivision (a)(1) allegation in case No. SS060035A on April 26, 2006. The court revoked defendant's probation in case No. SS042464A.

On September 7, 2006, the court imposed a four year sentence but suspended execution of the sentence and placed defendant on three years formal probation in case No. SS060035A. As the court completed recitation of the terms and conditions of probation, counsel interrupted to discuss expiration of defendant's probation in case No. SS042464A, as follows:

“[THE COURT]: ...You're ordered to serve 365 days in county jail; credit for –

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<sup>1</sup> All further statutory references are to the Penal Code.

<sup>2</sup> The facts underlying defendant's convictions are not included as they are not relevant to defendant's contention on appeal.

“[DEFENSE COUNSEL]: He has 216 actual, 108 conduct, for 324.

“THE COURT: 324. Those will be your credits, sir. You’re getting out relatively soon.

“[THE PROSECUTOR]: Today.

“THE COURT: *In case SS042464A, probation is revoked and reinstated under the same terms and conditions.* Defendant is ordered to pay \$644 for the cost of probation report, plus \$41 a month for the cost of supervision. If you’re able to do so.

“[PROSECUTOR]: Judge, the agreement with [the prosecutor on the probation violation (PV) matters], I thought, it’s not clear from her notes whether it was four years on both. I just – her notes are very brief to me, and she did not orally talk to me about this case.

“[DEFENSE COUNSEL]: And, you know, Judge, when [the prosecutor in this case] brought that up, I think we didn’t really factor that in. We did not discuss whether it should be on both.

“[THE PROSECUTOR]: The only reason I ask, wasn’t clear in the brief notes in the PV cases if he were to further violate, he would get four years prison. He did violate by being convicted of the 245(a).

“THE COURT: My notes dated 4/26/06 which would be after the new case, my notes indicate that defendant would be sentenced, would be ESS four years concurrent, 90 days evaluation. That’s what my notes say.

“[THE PROSECUTOR]: Okay. So concurrent. Okay.

“[DEFENSE COUNSEL]: That makes sense.

“[THE PROSECUTOR]: That would be four years on the PV case.

“THE COURT: Correct.

“[PROSECUTOR]: I would ask the Court to go ahead and do that at this point in time.

“THE COURT: All right. Sir, in the probation matter, probation is revoked. Probation’s previously been revoked. It is reinstated. In that case, Defendant is committed to the Department of Corrections for a total of, fixed term of four years. And I don’t have your credits at this time, sir.

“[DEFENSE COUNSEL]: I have them, Judge.

“THE COURT: Okay. Let me impose sentence in that case. Execution of sentence, I’m sorry, is suspended for three years under all the original terms and conditions.

“THE DEFENDANT: That’s four years suspended?

“[DEFENSE COUNSEL]: Concurrent.

“THE COURT: Correct, on both cases.

“[DEFENSE COUNSEL]: Concurrent with each other?

“THE DEFENDANT: Okay.

“[DEFENSE COUNSEL]: *For clarification, he’s been on probation on another case since 2005, would the normal expiration date remain?* I know we didn’t discuss extension.

“THE COURT: You’re right, we did not discuss an extension. *And I don’t think that there was any agreement to extend it. So, no. So your answer is, yes, the original date stays.*

“[DEFENSE COUNSEL]: *Okay.*

“THE COURT: *So that would be January, 2007.*

“[DEFENSE COUNSEL]: *Eight.*

“THE COURT: *Or eight. Okay. All right. Did I forget anything on that case?*  
Or do we want to do the credits?

“[DEFENSE COUNSEL]: I do have his credits. 360 actual, plus 180 conduct, for total of 540.

“[PROSECUTOR]: Should he be getting conduct credits?

“[DEFENSE COUNSEL]: They’re going to run concurrent.

“[PROSECUTOR]: Except that at that point in time, Your Honor, doesn’t matter.

“THE COURT: Those will be the credits, sir.

“THE DEFENDANT: *Your Honor, if I may ask, probation terminates 2008?*

“THE COURT: *Correct, on the old case, the first case you and I met on. That’s the domestic violence case. Okay.*

“THE DEFENDANT: And this case, it will be terminated?

“THE COURT: In three years from today.

“THE DEFENDANT: So that will be September 7 of 2009?

“THE COURT: Sir, you accept probation on those terms and conditions?

“THE DEFENDANT: Yes, ma’am.” (Italics added)

On January 15, 2008, the probation officer filed a petition for revocation of probation in both cases alleging defendant failed to report a change of address within 24 hours. Defendant failed to appear in court on January 22, 2008, and the court summarily revoked his probation in order to retain jurisdiction. The probation officer filed an amended petition on January 29, 2008, alleging defendant violated section 451, subdivision (d) [arson] and section 182, subdivision (a)(1) [conspiracy]. On February 13, 2008, the probation officer filed a new petition for revocation of probation in both cases alleging defendant violated section 451, subdivision (d) and section 182, subdivision (a)(1). All three of these petitions state the term of probation for case SS042464A as “5 years” beginning “January 13, 2005.”

On May 1, 2008, the court found defendant in violation of probation, and revoked probation in both cases. On June 11, 2008, the trial court terminated probation and imposed a sentence of four years in case No. SS042464A and imposed the previously

suspended sentence of four years in case No. SS060035A, with the sentences to run concurrently.

## **DISCUSSION**

Defendant contends that the legal implication of the discussion quoted above is that the trial court reinstated probation in case No. SS042464A, but ordered it to terminate on January 13, 2008. The clerk's transcript indicates that defense counsel and the trial court discussed the termination date of probation in case No. SS042464A and stated the termination date as "January 2008." Assuming this court agrees with defendant's contention, defendant argues that the trial court did not have jurisdiction to modify or revoke probation for case No. SS042464A on January 22, 2008, because the term of his probation expired on January 13, 2008.

The Attorney General contends that the trial court retained jurisdiction in case No. SS042464A until January 13, 2010, because it imposed a five-year probation term on January 13, 2005. The Attorney General further contends that the trial court misspoke when it calculated the probation expiration date as 2007 and then at 2008, but it did not intend to shorten the probation. The original and amended petitions for probation revocation support the Attorney General's contention because they all state the term of probation for case SS042464A as "5 years" beginning "January 13, 2005."

"[T]he authority to grant probation and to suspend imposition or execution of sentence is wholly statutory. [Citations.] During the probationary period, the court retains jurisdiction over the defendant [citation], and at any time during that period the court may, subject to statutory restrictions, modify the order suspending imposition or execution of sentence (§ 1203.3)." (*People v. Howard* (1997) 16 Cal.4th 1081, 1092.)

The attorneys raise arguments regarding the potential ambiguity of the trial court's statements at the sentencing hearing for case No. SS060035A on September 7, 2006.

However, in light of the statutory restrictions, we find that the trial court could not and did not modify the previously imposed probationary period.

Section 1203.3, subdivision (a) states in pertinent part: “The court shall have authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence.” Section 1203.3, subdivision (b) states in relevant part: “The exercise of the court’s authority in subdivision (a) to revoke, modify, change, or terminate probation is subject to the following: [¶] (1) Before any sentence or term or condition of probation is modified, a hearing shall be held in open court before the judge. The prosecuting attorney shall be given a two-day written notice and an opportunity to be heard on the matter . . . [¶] (A) If the sentence or term or condition of probation is modified pursuant to this section, the judge shall state the reasons for that modification on the record. [¶] . . . [¶] (2) No order shall be made without written notice first given by the court or the clerk thereof to the proper probation officer of the intention to revoke, modify, or change its order.”

The record does not reflect that the prosecuting attorney was given two-day written notice that a probationary term might be modified in case No. SS042464A, nor does it reflect that the court or clerk gave written notice to the probation officer of the court’s intention to modify the original probation order of January 13, 2005, imposing a five-year probationary period in that case. The court did not state on the record any reasons for modifying the probationary period, but did specifically state that probation was “reinstated on the original terms and conditions,” and that “the original [termination] date stays.” In addition, the original and amended petitions for probation revocation all state the term of probation for case No. SS042464A as “5 years” beginning “January 13, 2005,” which would tend to indicate that the probation officer had no notice that the original period of probation had been “revoke[d], modif[ied], or change[d].” (§ 1203.3, subd. (b).) Although the court answered affirmatively when defendant asked whether his

probation period ended in 2008, that answer does not indicate that the court intended to modify the original term of probation given that the court had twice before stated that the original terms and conditions, including the termination date, were to remain the same.

We therefore conclude that the termination date for probation in case No. SS042464A was January 13, 2010, as originally ordered. The court entered an order revoking probation in case No. SS042464A on January 22, 2008, well within the probationary period. Therefore, the court had jurisdiction to revoke probation in case No. SS042464A when it did so on January 22, 2008.

### **DISPOSITION**

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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MCADAMS, J.